

JUNE 30. 1761

Unto the Right Honourable the Lords of Council and Session.

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*Ag't a Mar^t being obt^d
for insol^y an^d ad^jud^g
before the days of Sem^r.
Hearance are run.*

P E T I T I O N

O F

14
Vide N^o 67 Vol. 10th

DER BLACKWOOD Merchant in *Edinburgh*;

Humbly sheweth,

THAT the Petitioner stood Creditor to *John Cathcart*, and *John Blackwood* of *London* Merchants, in Bonds and other Grounds of Debt to the Extent of about 920 *l. Sterling*: These Debtors becoming bankrupt in the 1745, the Petitioner received a small partial Dividend from the separate Estate and Effects of *John Blackwood*; but not a Farthing was recovered by the Assignees under the Commission of Bankruptcy from the joint Estate of *Cathcart* and *Blackwood*, who were Partners in Trade, nor from the separate Estate of the said *John Cathcart*.

That the said Bankrupts having obtained a Certificate from the Lord Chancellor, the Petitioner was obliged to be contented with the Loss of so great a Sum as what remained still due on his Debt. *Mr. Cathcart*, however, having been before, and since his Bankruptcy, possessed of a considerable Office, did,

did, subsequent to the said Certificate, make Payment to such of his Creditors as he most favoured, particularly to *Robert Hamilton of Boutriehill*: But altho' the Petitioner was a most onerous Claimant, having for a Course of Years, run the greatest Risks to support the Credit of *Mr. Cathcart* and his Partner, when in a declining Way; yet *Mr. Cathcart*, when repeatedly applied to, declined bestowing one Farthing upon Reparation of the Loss he had been the Means of occasioning to him. The Petitioner, however, must have acquiesced, if the Chancellor's Certificate stood good as a total Discharge to the Bankrupts; but having been at length informed, that *Mr. Cathcart* had succeeded his Father in the Property of certain Lands, called *Glendusk*, which he had not surrendered to the Commissioners or Assignees of his Bankruptcy, but still kept in his Possession, the Petitioner was advised to bring an Action against him in this Court, for Payment of the Balance of his Debt, in respect that such Concealment is by Law a Voidance of the Bankrupt Certificate.

This Action has been some Time depending before the Lord *Coalston*; and during the Course of it, it appeared, that *Mr. Cathcart* had also concealed the Property he had of a House in *Edinburgh*, derived to him by Accession from his Father, long before his Bankruptcy.

On this Discovery, the Petitioner was advised to lead an Adjudication, both of the Lands of *Glendusk*, and of the said House in *Edinburgh*. The Defender objected to the Adjudication of the Lands, which was sifted accordingly, till the Issue of the Cause before Lord *Coalston*; but as to the House, he admitted, that he had no Defence, and accordingly the Petitioner obtained Adjudication of it on the 26th of June 1760.

The Petitioner hoped, that at any Rate he would be allowed to recover what he could from that Subject, but he now finds himself like to be disappointed; for *Mr. Hamilton of Boutriehill*, one of *Mr. Cathcart's* Favourite Creditors, has raised another



another Adjudication of the same Subjects, which the Petitioner, till it otherways appear, must be forgiven to consider as a collusive Step of Diligence, taken to cover this Part of Mr. *Cathcart's* Estate : At least, as the Petitioner's Adjudication was no Secret, and the same Gentleman is Agent for Mr. *Cathcart* and Mr. *Hamilton*, no good Reason can be assigned, why Mr. *Hamilton's* Adjudication might not have been brought in due Time after the Petitioner's : However, it seems that Step was too long overlooked, so that Mr. *Hamilton's* Summons was not executed against Mr. *Cathcart*, who constantly resides at *London*, earlier than the 4th of *April* last, whereby the first Diet to which he was cited (as filled up in the Summons) was the 12th, and the second, the 28th of *June* current. Mr. *Hamilton* thus finding, that his Summons could not be inrolled within the Year of the Petitioner's Adjudication, applied by Petition to your Lordships, on the 19th of *June* current, for a Warrant for calling, inrolling and decerning directly in his Adjudication. He mentioned one Instance where such Indulgence had been formerly granted ; and your Lordships were thereupon pleased, " To grant Warrant to, and authorise the Clerks to call, and the Keeper of the Rolls to inrol the above Adjudication in the next Week's Regulation Roll for the Outer House, notwithstanding that the second Diet of Compearance is not come, and authorise the then Ordinary to pronounce Decreet of Adjudication therein." Accordingly, on the 24th of *June*, the Lord *Auchinleck* Ordinary, " Adjudged, decerned and declared at the Instance of the Pursuer *Robert Hamilton* so far as concerns the Subjects libelled, lying in the Town of *Edinburgh*, formerly adjudged by *Alexander Blackwood*, reserving all Objections *contra executionem*."

The Petitioner hopes to be forgiven for submitting the above Interlocutors to your Lordships Review, as being of considerable Importance to him, and of still more general Consequence in Point of Precedent.

In

In the first Place then, the Petitioner must observe, that, according to the Laws of all civilized Nations, Sentence is not suffered to pass against any Man's Person, or Estate, till an Opportunity is given him, if he thinks fit to use it, of being heard in his Defence. The Compearance of the Defender was held so requisite by the ancient *Romans*, that, according to the Law of the Twelve Tables, the Pursuer was authorised first to require his Party to compear; and, if he refused, to lay Hands upon him, and drag him to the Tribunal *oborto collo*. This Form was justly thought indecent and improper by *Justinian*, who, in Place thereof, appointed the Libel to be exhibited to the Defender; and in Testimony thereof, ordained him to subscribe it, and afterwards allowed him twenty Days to deliberate upon his Defence, *Novel. 53, 86, 112*. Since that Time, in all the Countries of *Europe*, Defenders have been called into Court, by Citations executed by a public Officer, to compear after a certain definite Time. Lord *Stair* observes,

Book IV. Tit.
38. § 2.

“ That a Warrant for citing is not properly an Action till actual Citation be added thereto; for a Summons is so named, “ a *summonendo*, because it advertises the Party to compear “ before the Judge; and a Citation is, a *citando*, because it “ hastens the Defender to compear at the Term contained in “ the Summons. But, seeing the Defenders may compear “ any Moment in the Hour of Cause that Day, they are not “ called till the next Sederunt Day, or any Day after.”

Our Ancestors seemed to have had the strongest Idea, that no judicial Proceedings could be just and regular, unless the Defender was in Court, or full Time and repeated Notice given him. Many Laws very ancient were made to that Effect. Parties were originally called upon Brieves issued from the King's Chancery; and by the Act 30th, 1449, no less than three Summonses, each upon fifteen Days Notice after the other, were appointed to be given, even to Parties within the Kingdom. After the Institution of the College of Justice,
Summonses

Summonses were expedie in the King's Name, and under the King's Signet, by the Writers to the Signet. Still, however, the Length of the *inducie* was held to be a Matter of so high Importance, that it was expressly regulated in different Cases by sundry different Statutes, granting particular Privileges to particular Cases and Actions. At length, the Use of different Summonses expedie and execute one after another, was found troublesome and expensive; and therefore, by the Act of Parliament 6th, 1672, one Summons was ordered to be issued, containing two several Warrants for citing the Defenders at two several Times, and to two distinct Diets and Days of Compearance; the Citations to the first and second Diets being each given upon the same Number of Days respective, that the first and second Summonses formerly were. Further, by the Act 12th, 1693, the Citations to both first and second Diets were allowed to be given at the same Time.

Amidst all these Regulations by Statute, some Confusion had crept into the Practice of the Writers, particularly in shortening the Diets of Compearance, and thereby unwarrantably giving the Privileges of certain Actions to others that were not privileged. To remedy this Abuse, your Lordships Predecessors passed an Act of Sederunt, 29th of June 1672, providing, that all Summonses should be given upon twenty-one Days Warning for the first Diet, and six Days Warning for the second, excepting in the alimentary Causes, and others therein mentioned, which are specially privileged to pass upon a shorter *inducie*; but among these, Summonses of Adjudication are not mentioned, neither have they ever been considered in Practice as privileged, either as to the Number of Diets or Days of Compearance, but always expedie with two Diets, and upon the common *inducie*.

As Persons out of the Kingdom, cannot be cited in the usual Form, either personally or at their Dwelling Place; so other Acts have directed an edictal Citation to pass against them, at the Market-cross of *Edinburgh*, and Pier and

Shore of *Leith*, as reckoned the Places of the most publick
Resort: But as from their Situation, more Time is requisite
for their Friends to transmit them Notice, or for them to re-
ceive it by common Report, than if they were cited in the
usual Manner: Therefore, according to the constant and im-
memorial Practice, confirmed by your Lordships Decisions,
and approved by all our Lawyers, the *inducie* given to such
absent Persons, for the first and second Diets, instead of
twenty one and six, are sixty and fifteen Days *respective*.
Nor, with great Deference, can any Stress be laid upon
what Lord *Stair* says, that Adjudications may pass upon one
Diet, *where Parties are near*. That Opinion is founded upon
the Authority of no Statute or Regulation whatever. An Ad-
judication is a Process of that Kind, which deserves Attention
as much as any can do: It is an extraordinary Remedy, for
conveying the Estate of the Defender, in Satisfaction of the
Pursuer's Debt. The Law has therefore given an Alternative
to the Defender, which is specially libelled on, that if he
thinks fit, he may produce a Progress, and prevent more of
his Estate from being affected, than answers the Extent of
the Debt. It would be very hard therefore, to deprive him
of the Opportunity of taking the Benefit of that Alternative,
by assigning him fewer Diets, or giving him a shorter *inducie*
than usual, for his Compareance, especially when he is not
near, but out of the Kingdom. Accordingly, the uniform
Practice, since Adjudications were introduced, has explained
the Sense of your Lordships, and of all the Practitioners, that
Adjudications shall pass upon two Diets, and that when
out of *Scotland*, he shall have sixty and fifteen Days *inducie*
assigned him for these Diets. It is submitted therefore, with
all due Deference, if it is competent for your Lordships, at
least, without first passing an Act of Sederunt, to make an
Adjudication a privileged Cause, or to deprive the Defender
of the ordinary Diets, and *inducie* upon it.

2do, Your Lordships will be pleased to consider, that Summonses of all Kinds are issued from the King's Signet, authorising Messengers at Arms to cite the Defenders to compare at the Diets therein mentioned. The Petitioner hence apprehends, that the Summons once issued and executed, agreeable to Law and Practice, cannot be altered in an essential Point, in Favour of the Pursuer, and in Prejudice of the Defender. Here the Days of Compareance are filled up in the Summons, the *twelfth* and *twenty eighth* of *June*, and the Execution bears, that the Defender was cited to the Days *therein mentioned*: This implies a Sort of Contract between the Parties, that the Defender shall appear at the Days to which he is cited; and that if he does so, the Certification of the Summons shall not take Place, till he be heard, or those Days elapsed. How then is it possible with Propriety, to deprive him of any of the Time given him in the Summons and Execution; and to make Certification pass against him, for not Compareance, and so deprive him of the Benefit of a favourable Alternative, before the Diet comes, when he was required to attend, to prevent that Certification, or take the Benefit of that Alternative?

3tio, Till the Days of Compareance to which a Defender is cited, are passed, there is no Action or Process depending in Court, upon which your Lordships can give any Order, or pronounce any Decreet. The Case is quite different where the Days are run; for then the Defenders are held to be in Court, and there is a depending Action there, which your Lordships may justly forward in its Issue, by dispensing with mere Forms of Court, liable to be varied at your Lordships Pleasure. No Precedent therefore can be drawn from your Lordships sometimes dispensing with the Outgiving of a Summons of Adjudication after the Days of Compareance are elapsed, to bring in a Creditor on the Act 1661. Upon the Principle here maintained, your Lordships no longer ago than last Session, refused to grant Warrant for inrolling a Declarator of a Right of Redemption of a Wadset at the Instance of Mr. Campbell.

Campbell of Glenure, and other Adjudgers of the Estate of *Appin*; altho' it was represented, that if the Summons was not called before the Days of Compearance were run, the Wadsetter might object, that the Equity of Redemption limited to a precise Time was foreclosed: There the Days were not filled up in the Summons, but the Days mentioned in the Copies of Citation were not yet run; and altho' the *inducie* that was necessary to have been given was expired before the Application; yet as the Days in the Copies were not passed, your Lordships refused to inrol the Summons. This is a still stronger Case than the present, where no more Time is given by the Summons and Citation than the Law and Practice requires; and in the very same Case of *Appin*, tho' your Lordships would not dispense with the *inducie*; yet after the the Days were run, upon a new Application, you dispensed with the Form of giving out the Summons.

This leads the Petitioner to notice the only Reason, upon which it is apprehended your Lordships pronounced the Interlocutor now reclaimed against; namely, that the Dispensation craved by Mr. *Hamilton* had been granted in other Cases of the same Kind: Were this really so in general, it would not tie down your Lordships to continue a Practice after it appears to be improper: A strong Example of this occurred in the Case of special Charges, in which for a long Tract of Years, the Writers were in Use to leave the Lands blank, and Adjudications upon them were nevertheless sustained; yet your Lordships in the 1736 condemned that Practice, and have since uniformly sustained that Defect as a total Nullity. But further, Mr. *Hamilton* could only condescend on one Case in the 1758, *Newall contra Macklamroch*, where the *inducie* of an Adjudication were dispensed with. That Case passed in *Absence*, and at best is a single one, so could not establish a Rule. On the other Hand, the Petitioner is informed by Mr. *William Tytler* Clerk to the Signet, that being Creditor to *Keith of Craig*, and about to adjudge the Estate, he, in the 1744, applied by Petition

to your Lordships, setting forth, that he could not be within Year and Day of a prior Adjudication, unless the Days of Appearance were dispensed with, the Days of the first Diet being already run; and moreover, that the Execution of his Summons had been delayed by the Debtor's amusing him with Promises of Payment: But your Lordships nevertheless, refused the Petition, and left Mr. *Tytler* to follow the ordinary Course. To this Case is to be added the Decision of *Appin*, which it is hoped will be found more than sufficient to balance the single one of *Newall* quoted on the other Side.

The Petitioner shall conclude, that supposing it were competent to grant the Desire of Mr. *Hamilton's* Petition, he still apprehends, there is neither Equity nor Expediency for doing it, at least in this circumstantiated Case. Your Lordships have already heard the Hardship with which it is attended to the Debtor, by foreclosing him of any Defence, or of the Benefit of the Act of Parliament 1672; and as to the Act 1661, it is correctory of the former Law, and the Year, which it allows to Creditors, cannot be extended. Neither did the Legislature suppose, that posterior Creditors were to proceed in comprising or adjudging otherwise than as usual. The Year is at any Rate a sufficient Time for them to adjudge; and by bringing in another Creditor, whose Negligence has thrown him without it, a *Prejudice* unwarranted is done to the prior Creditor, who has regularly *expede* his Diligence: Here too, Mr. *Hamilton*, or at least his Doer, knew of the Petitioner's Adjudication from the Day it was pronounced; and the Petitioner has good Reason to apprehend, that the chief View of Mr. *Hamilton's* Adjudication, is not to recover his Debt, but to serve his Friend Mr. *Catcart*, who has voluntarily made large Payments to him, altho' he would never pay one Farthing to the Petitioner since his Bankruptcy.

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May it therefore please your Lordships, to alter your Interlocutor of the 19th, and the Lord Ordinary's Interlocutor of the 24th of June current, in Consequence thereof; and to refuse the Desire of Mr. Hamilton's Petition, or to find, that his Summons of Adjudication could not be inrolled, or Decreet pronounced upon it, before the Days of Compearance were run.

According to Justice, &c.

DAV. RAE.

